Editor's note: appeal filed, sub nom. Exxon Mobil Corp. and Tosco Corp. v. Norton, Civ. No. 00-B-2524 (PAC) & 00-B-2536 (D. Colo.), aff'd (May 29, 2002); 206 F.Supp. 2d 1085, Civ. NO. 00-B-2524 appealed to 10th Cir., aff'd, No. 02-1344 (Oct. 15, 2003)

UNITED STATES

v.

TOSCO CORPORATION, EXXON CORPORATION

IBLA 98-164, 98-165 Decided August 31, 2000

Appeals from a consolidated decision by Administrative Law Judge Harvey C. Sweitzer, declaring unpatented oil shale placer mining claims null and void. Colorado Contests No. 757, 758.

Affirmed in part; set aside in part.

1. Mining Claims: Assessment Work

30 U.S.C. § 28 (1994) calls for the expenditure of $100 in assessment work on or for the benefit of a mining claim each year until patent. Before patent can be obtained the claimant must have made improvements valued at $500 or more (30 U.S.C. § 29 (1994)), but the expenditure of $500 does not terminate the ongoing requirement in 30 U.S.C. § 28 (1994), for expenditure of $100 each assessment year.

2. Mining Claims: Assessment Work--Mining Claims: Determination of Validity

The United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1994), and the Department has jurisdiction to challenge the validity of a mining claim for failure to substantially comply with the assessment work requirement.

3. Mining Claims: Assessment Work--Mining Claims: Determination of Validity

Where a mining claimant resumes performance of assessment work after a period of nonperformance of assessment work, he generally may revive the claim. However, where a third party right attaches

during the period of inactivity, the claimant is precluded from regaining his claim by resuming work. In the case of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1994), the United States is the intervening third party and the resumption doctrine does not apply to oil shale claims.

APPEARANCES: Donald L. Morgan, Esq., Washington, D.C., for Contestee Tosco Corporation; James A. Baker, Esq., Denver, Colorado, for Contestee Exxon Corporation; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for Contestant Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Tosco Corporation and Exxon Corporation (Contestees) have appealed from a January 9, 1998, consolidated decision (ALJ decision) by Administrative Law Judge (ALJ or Judge) Harvey Sweitzer declaring the Hydrocarbons Nos. 76 through 87, inclusive, as amended, unpatented oil shale placer mining claims, situated in secs. 7, 17, and 18, T. 5 S., R. 99 W., Sixth Principal Meridian, and in secs. 11, 12, 13, and 14, T. 5 S., R. 100 W., Sixth Principal Meridian, Garfield County, Colorado (Contest No. 757), and the Atlantic Nos. 1 through 8, Princess Anne Nos. 1 through 4, inclusive, and Washington Nos. 1 through 8, inclusive, unpatented oil shale placer mining claims, situated in secs. 21, 28, 29, 30, and 31, T. 4 S., R. 97 W., Sixth Principal Meridian, Garfield County, Colorado (Contest No. 758), null and void for failure to substantially comply with annual assessment work requirements at 30 U.S.C. § 28 (1994). 1/

The Bureau of Land Management (BLM or Contestant) has appealed from that part of the January 9, 1998, decision which holds that a discovery of a valuable deposit of oil shale existed on each of the contested claims on February 20, 1920, and on the date the Contestees were issued final certificates for the claims by BLM. (Contestant's Statement of Reasons (BLM SOR) at 1; see ALJ decision at 57-74.)

The 12 Tosco claims in Contest No. 757 (Hydrocarbon Nos. 76 through 87), embracing approximately 1,912 acres, were located on December 6, 1917. (Ex. G-757-39, at 5; Contestant's SOR at 7.) Tosco acquired the claims on April 23, 1979, for the purchase price of $9,562.10 ($5 per acre for 1,912.42 acres). (Exs. G-757-12, Table 3; C-213.) Tosco filed a patent application for the claims on June 11, 1985, and by July 27, 1988, when

_____

1/ Not at issue in these appeals is the nonmineral character of certain portions of the Tosco claims in Contest No. 757, and Judge Sweitzer's ruling that those portions of the claims are invalid and not eligible for patent. See ALJ decision at 74-75.

the First Half-Mineral Entry Final Certificate was issued, Tosco had paid all applicable fees and the purchase price for issuance of the patent. (Exs. G-758-16; G-758-52; G-758-12.)

The 20 Exxon claims involved in Contest No. 758 (Atlantic Nos. 1 through 8, Washington Nos. 1 through 8, and the Princess Anne Nos. 1 through 4), including approximately 3,203 acres, were located on December 1, 1919. (Ex. C-1, Stip. 2.) Exxon purchased the 20 claims at issue here and 52 other claims on February 2, 1966, for the sum of $100. (Exs. G-758-70; C-1, Stip. 3.) In January 1984, Exxon filed a patent application for the 20 claims. (Ex. C-1, Stip. 4.) Exxon paid all applicable fees including the purchase price for issuance of a patent on January 23, 1984. (Ex. C-1, Stip. 19.)

The contest was initiated when BLM, on May 3, 1995, in the case of Exxon, and on May 25, 1995, in the case of Tosco, filed separate complaints charging lack of discovery, within the limits of each claim, of an oil shale deposit sufficient to support a valid location on or before February 25, 1920, the lack of a present discovery of a valuable deposit on each claim, and the failure of the claimants and their predecessors in interest to comply with 30 U.S.C. § 28 (1994), by failing to substantially comply with the annual assessment work requirement. The two complaints were consolidated for hearing.

A hearing was held before Judge Harvey Sweitzer on February 10 and 11, 1997, in Denver, Colorado.

In his January 9, 1998, decision, Judge Sweitzer found (a) that the contested claims are invalid for failure to substantially comply with the annual assessment work requirement in 30 U.S.C. § 28 (1994) (ALJ decision at 18-25); (b) that the Department of the Interior was not required to bring the charge of default in assessment work prior to expiration of the publication period (ALJ decision at 25-32); (c) that a substantial lack of compliance with the assessment work requirement did and does concern the Government and did and does justify invalidation of an oil shale claim (ALJ decision at 32-34); (d) that the resumption doctrine is inapplicable (ALJ decision at 34-39); (e) that a claim must be declared invalid if there has been a failure to substantially comply with the assessment work requirement (ALJ decision at 39); (f) that the performance of $500 worth of assessment work does not constitute substantial compliance with the assessment work requirements of 30 U.S.C. § 28 (ALJ decision at 40-41); (g) that Contestant BLM has proven by clear and convincing evidence a lack of substantial compliance with the assessment work requirement in the case of both Tosco and Exxon (ALJ decision at 41-50); (h) that the doctrines of estoppel and laches do not bar invalidation of the claims for failure to substantially comply with the assessment work requirement (ALJ decision at 50-54); (i) that the Contestees' due process rights have not been violated (ALJ decision at 55-57); (j) that a discovery of a valuable mineral deposit existed on each claim on the date of withdrawal and on the date of issuance of the final certificate because both the physical finding element and the

value element of the test for discovery had been satisfied for each claim (ALJ decision at 57-74); and (k) that certain listed subdivisions of the Tosco Hydrocarbon Nos. 79, 82, 83, and 86 claims are nonmineral in character for oil shale because the subdivisions occupy a stratigraphic horizon in which the oil shale beds have been completely eroded away and the claims are therefore void. (ALJ decision at 74-75.)

On February 6, 1998, Contestee Exxon filed a notice of appeal with the Salt Lake City Office of the Office of Hearings and Appeals, and this was followed on February 9, 1998, by similar notices filed by Contestee Tosco and Contestant BLM.

Both Tosco and Exxon challenge that part of Judge Sweitzer's decision which found lack of substantial compliance with statutory assessment work requirements imposed by 30 U.S.C. § 28. BLM challenged the ALJ finding that a discovery of a valuable mineral deposit existed on each claim.

In his decision, Judge Sweitzer found from the evidence that the required affidavits of assessment work were not filed and the required assessment work was not performed on the Tosco claims for a significant period between location in 1919 and the date of patent application. He specifically found that

> qualifying assessment work of at least $100 was performed for each of the Tosco claims for the assessment years ending in 1919 through 1928, 1958, 1959, and 1975 through 1987. Also, no assessment work was required for the year ending in 1932, as the assessment work requirement was suspended for that year. Finally assessment work was required but not performed for the assessment years ending in 1929 through 1931, 1933 through 1957, and 1960 through 1974, with the exception that no assessment work was required for the year ending in 1935 for the Hydrocarbon Nos. 76, 77, 78, 81, 84, and 87 claims, as a notice of intent to hold those claims was filed for that year. Consequently, substantial compliance with the assessment work requirement was not achieved for any of the Tosco claims.

(ALJ decision at 47.) He similarly determined a lack of substantial compliance with the assessment work requirement on the part of Exxon:

> With regard to the remaining years ending in 1920 through 1972, the evidence does clearly and convincingly show that no assessment work was performed. Like Tosco, Exxon has submitted no evidence of work to counter the findings of the Departmental examiners that no assessment work was performed for more than 45 years, but rather, relies upon the aforementioned argument that a field examination cannot clearly and convincingly show a lack of assessment work in prior years.

While erosion, revegetation, and vegetation density are factors affecting a field examiner's ability to locate assessment work, the Departmental examiners were thorough in their examinations and have shown that small excavations dating back to 1920's (the pits on the Tosco claims and those nearby but outside the Exxon claim group) can be located with a high degree of success. Moreover, the finding of no assessment work for the years ending in 1920 through at least 1928 is supported by a contemporary examination of the claims performed in 1928.

* * * * * * *

For the years ending in 1973 through 1988, Exxon filed affidavits stating that assessment work worth at least $2,000 or $100 per claim was performed for each year. However, for the year ending in 1974, Exxon claims only $500 worth of work in the form of the installation of culverts and the grading of 15 miles of road. All of the work was road maintenance to allow access to the claims and there is no dispute this work was performed.

However, Contestant is correct that this work does not qualify as assessment work. There is not one shred of evidence that the purpose of the road maintenance was to facilitate development of the claims. Unlike the nearby oil and gas road, the poor roads leading to and traversing the claims were not improved to allow passage of heavy equipment necessary for drilling or other development activity, but rather, they were merely maintained. The roads do not lead to any excavations or other mining activity performed or planned subsequent to 1973 because there have been none. * * *.

* * * * * * *

Contestees' argument is rejected as contrary to established law, as set forth in published decisions of the Department and the courts dating back to the turn of the century. As previously noted, road work qualifies as assessment work <u>if</u> it is performed for the purpose of assisting in the development of the claims, such as transporting machinery and materials. [<u>United States v.</u>] <u>El Portal Mining Co.</u>, 55 Interior Dec. [348] at 351 [1935]; <u>see also</u> [<u>United States v.</u>] <u>9,947.71 Acres of Land, Etc.</u>, 220 F.Supp [328] at 332 [1963]; <u>Emily Lode</u>, 6 Pub. Lands Dec. [220] at 222 [1887]; <u>Tacoma and Roche Harbor Lime Co.</u>, 43 Pub. Lands Dec. [128] at 134-35 [1914]. Roads should be associated with actual excavations so as to clearly show that they are intended for use in connection with the claims under consideration. 2 <u>Lindley on Mines</u> § 629 p. 1542. The assessment work requirement is not satisfied by work done merely to comply with the assessment work requirement and to hold the property without any intent to make use of the work product within a reasonable period of time for the

> purpose of mining the claim. See Hough v. Hunt, 70 P. 1059, 1060 (1902); Kinsley v. New Vulture Mining Co., 90 P. 438, 439 (1907). See also [United States v.] Ruddick, 52 Pub. Lands Dec. [313] at 324 [1927] (bridge and road work expenditures, after operations had been abandoned and equipment removed, and with no evidence of a contemplated resumption of drilling operations, cannot be accepted as qualifying acceptance work).

(ALJ decision at 48-50.)

Judge Sweitzer relied on United States v. Herr, 130 IBLA 349, 357, 101 I.D. 113, 117 (1994), in rejecting Contestees' claim that even though a claimant performed no assessment work for a time, the claim may be revived by the claimant's resumption of assessment work regardless of intervening rights which attached during the period when no assessment work was performed. (ALJ decision at 34-39.)

In addressing the relationship between 30 U.S.C. § 28 and 30 U.S.C. § 29, Judge Sweitzer again cited Herr, supra at 357, in holding that compliance with the one-time $500 requirement (30 U.S.C. § 29 (1994)) for patent application did not constitute "substantial compliance" with the annual assessment work requirement of 30 U.S.C. § 28. (ALJ decision at 40.)

In their joint statement of reasons (Tosco SOR), Contestees challenge Judge Sweitzer's conclusion that lack of performance of assessment work rendered the claims null and void. Contestees argue that:

> Judge Sweitzer's conclusion conflicts with well-settled Department and judicial law that, while a protest can be brought by anyone, a private challenge of assessment work default can be brought only by a rival claimant, i.e., someone who claims the same land as a relocator. A protester has no standing to complain of nonperformance of assessment work; only a rival mining claimant can do that. Even then, the claimant must bring his challenge promptly in a court suit, to be filed within 30 days of the filing during the publication period of a notice of adverse claim. The Department lacks jurisdiction to adjudicate an assessment work dispute between private parties. Only the courts can. *E.g.*, 30 U.S.C. § 29; authorities cited above at pages 13-14.

(Tosco SOR at 28.)

In response to Judge Sweitzer's determination that certain of the road work completed on the claims could not be accorded recognition as valid assessment work, Contestees contend that the Department has taken a different view in the past. Citing the December 10, 1920, "General Report, Oil Shale Situation, Western Colorado," Contestees claim that:

> Mineral Examiners Oral J. Berry and G. L. Duer and Special Agent J. E. Connolly reported to the Commissioner that trails

> were necessary for access to claims and for removal of ore "and in many instances, numerous trails are necessary for the working of single groups of claims," that it was necessary to maintain work crews on the ground "and cabins must be maintained for this purpose[ ] and quarters for the men maintained while they are at work["] and that "much of the work * * * consists of open cuts, shallow trenches on the face of the escarpments and the sinking of pits into the oil shale deposits from the surface." * * * They continued
>
> * * * * * * *
>
> All of this work has been earnestly undertaken by those who are really interested in the development of the shales, those exposures have been made for a useful purpose, and . . . should be considered legitimate development work for patent purposes. [Citing Ex. C-231 at 5-7.]

(Tosco SOR at 32 (footnote omitted).)

In their SOR, Contestees further argue the importance of two cases, Wilbur v. Krushnic, 280 U.S. 306 (1930), and Ickes v. Virginia-Colorado Development Co., 295 U.S. 639 (1935), for the proposition the Government should not be able to take away an oil shale claimant's rights for lack of assessment work, and that the claim owner was entitled to resume assessment work at any time. (Tosco SOR at 16-22.)

Third, Contestees herein, with regard to the assessment work issues, contend that from the the date of location of the claims in contest until at least 1991,

> the Department maintained a rule that resumption of work cured a prior default so that a challenge for a default could be made only during a default. This rule has a clear statutory basis and has been consistently recognized by the courts. Again, no compelling reason has been given for retroactive departure from this rule. Any past default on the claims in contest had been cured in the years preceding the filing of patent applications and the issuance of final certificates, which terminated any further obligation to perform assessment work, and did so prior to 1991.

(Tosco SOR at 4.)

In its statement of reasons for appeal (BLM SOR) of the January 9, 1998, decision, Contestant BLM challenges Judge Sweitzer's determination that all prospectively valuable deposits of oil shale, in sufficient quantity, meet the value element of the test for discovery under the 1872 Mining Law. (BLM SOR at 2.) BLM also challenges the ALJ's determination that the physical finding element of the test of discovery has been satisfied for each of the contested claims. (BLM SOR at 38.)

In his decision, Judge Sweitzer had held that a thin, lean exposure in the Green River Formation is generally deemed sufficient for a discovery, even if the richer "valuable" strata are not exposed on a claim, because the presence of these strata at depth is generally known or reasonably certain. (ALJ decision at 69.) The ALJ made the following specific determination:

> All of the claims contain exposures of at least lean oil shale in the Green River Formation under conditions, both on the date of withdrawal and on the date of issuance of the first half of the final certificate, where the existence of the richer "valuable" strata of the Parachute Creek Member at depth was either known through exposures of those strata or reasonably certain through geologic inference; therefore, the physical finding element of the discovery test has been satisfied for each claim.

(ALJ decision at 69.)

The critical issues in this appeal are whether the failure to perform assessment work renders these claims void, and whether a discovery of a valuable mineral deposit on each of the contested claims existed both on the date of discovery and on the date of issuance of the First Half of the Final Certificate. We hold that Judge Sweitzer's affirmative finding on the assessment issue is supported both in law and fact. We determine that we need not reach the issue of discovery and we do not do so.

In addressing the assessment issues, we are guided by our rulings in United States v. Cliffs Synfuel Corp. (Cliffs Synfuel), 146 IBLA 353 (1998), Jerry D. Grover d.b.a. Kingston Rust Development, 139 IBLA 178 (1997), and United States v. Herr, supra.

[1] The governing statute in Contestees' appeal, 30 U.S.C. § 28 (1994), calls for assessment work of a value of $100 for the benefit of each mining claim each year until patent. Before patent can be obtained, a claimant must have made improvements valued at $500 or more. 30 U.S.C. § 29 (1994). The expenditure of $500, however, does not terminate the ongoing requirement for expenditure of $100 each assessment year specified in 30 U.S.C. § 28 (1994). See Andrus v. Shell Oil Co., 446 U.S. 657, 658 n.1 (1980). In Cliffs Synfuel, supra at 359, we quoted from our decision in United States v. Energy Resources Technology Land, Inc. (Energy Resources), 74 IBLA 117 (1983), rev'd sub nom. Savage v. Hodel, Civ. No. 83-1838 (D. Colo., Nov. 19, 1983), vacated as moot, TOSCO Corp. v. Hodel, 826 F.2d 948 (10th Cir. 1987), where we observed that the requirements of 30 U.S.C. § 29 (1994) (performance of $500 worth of assessment work as a prerequisite to the issuance of patent) and 30 U.S.C. § 28 (1994) (yearly performance of $100 worth of assessment work) are only indirectly related. We stated in Energy Resources:

> [W]hile it is true that the requirement of section 29 can be satisfied by the performance of annual labor pursuant to section 28, the reverse is not possible. If it were, a claimant could do $500 worth of improvement on his claim during

> the first year of location--before the obligation to perform assessment work had even accrued--and then hold the unpatented claim for the next 50 years without ever performing any of the annual assessment work required by section 28. Clearly the 1872 Act did not contemplate that once a claimant had accomplished $500 worth of work he would thereafter be excused from any further work.

Id. at 122.

The Federal courts and this Board have held on numerous occasions that while a claimant may have made improvements valued at $500 in order to obtain patent, such expenditure does not terminate the ongoing requirement for expenditure of $100 each assessment year in 30 U.S.C. § 28 (1994). See Andrus v. Shell Oil Co., 446 U.S. 657, 658 n.1 (1980); Hickel v. The Oil Shale Corp., 400 U.S. 48, 54-55 (1970); Cliffs Synfuel, supra at 359; Jerry D. Grover d.b.a. Kingston Rust Development, supra at 181-82. Our review of the evidence considered by Judge Sweitzer convinces us that he was correct in concluding that Contestees did not meet this requirement with respect to any of the their claims in issue.

[2, 3] As we noted in Cliffs Synfuel, supra at 359, oil shale deposits on lands in Federal ownership were withdrawn from location under the 1872 Mining Law by section 37 of the Mineral Leasing Act of 1920, which made oil shale deposits subject to Federal leasing. 30 U.S.C. §§ 193, 241(a) (1994). Excepted from this provision were valid mining claims located before February 25, 1920, "thereafter maintained in compliance with the laws under which initiated." 30 U.S.C. § 193 (1994).

We stated in Cliffs Synfuel, supra at 360, that Wilbur v. Krushnic and Ickes v. Virginia-Colorado Development Corp., supra, are not controlling in this context. We explained that the "resumption doctrine" articulated in Krushnic (holding that if a claimant does not do the necessary annual labor for a period of time, but resumes before another party's rights attach, nothing is lost by allowing the claimant to revive the claim with his labor, rather than formally relocating the claim) does not apply in the case of oil shale claims where a default has occurred after the claims became subject to section 37 of the 1920 Leasing Act. As we noted in Cliffs Synfuel, supra at 360, during the period that the claim is abandoned and the land is subject to appropriation, Federal rights attach, and the intervention of those rights deprives the claimant of the ability to reactivate the claim by resumption of work. The attachment of valid rights during a period of nonperformance of assessment work was recognized when the Supreme Court found in Hickel v. Oil Shale Corp., supra at 57, that the United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1994). The Hickel Court specifically held that "every default in assessment work does not cause the claim to be lost," however, "token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28 is not adequate to 'maintain' the claims within the meaning of § 37 of the Leasing Act." Id. at 57.

We explained in Cliffs Synfuel, supra at 360, that section 37 of the 1920 Leasing Act effectively amended the 1872 Mining Law by making oil shale a leasable, rather than a locatable, mineral. Although for a period following passage of the 1920 legislation, the courts and the Department stated that a failure to do assessment work would not inure to the benefit of the Government, this interpretation was abandoned by the Department after the Supreme Court handed down Hickel v. Oil Shale Corp. in 1970, the Court concluding that "[Krushnic and Virginia-Colorado Development] must be confined to situations where there had been substantial compliance with the assessment work requirements of the 1872 Act." Id., quoting Hickel v. Oil Shale Corp., supra at 57. We noted in Cliffs Synfuel, supra at 360 and in Herr, supra at 367, 101 I.D. at 122, that after the 1970 United States Supreme Court decision in Hickel v. Oil Shale Corp., supra, 2/ the resumption doctrine was no longer applicable to oil shale claims, and we find that it is not available to Contestees here.

Finally, in Herr, supra at 367-68, we stated: "Having concluded that the Judge properly found the claims void for failure to perform assessment work, we need not, and will not consider whether the claims are invalid for other reasons." This principle applies to the present case. Thus, to the extent not discussed herein, BLM's arguments concerning the failure of Exxon's and Tosco's claims to meet the Department's test for a qualifying discovery are rejected as unnecessary to the determination that the claims are void. See also, Cliffs Synfuel, supra at 361. Therefore, that portion of the ALJ's decision below which addressed the question of a discovery of a valuable mineral deposit on each of the subject claims is set aside and the decision modified accordingly.

Except to the extent they have been expressly or impliedly addressed in this decision, all other errors of fact or law raised by Contestees or Contestant are rejected on the ground that they are contrary to the facts or law or are immaterial.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed in part, and set aside in part.

_____
James P. Terry
Administrative Judge

I concur:

_____
David L. Hughes
Administrative Judge

_____
2/ See 30 Rocky Mt. Min. L. Inst., § 10.02 [2] (1984), for a discussion of pre-Oil Shale Corp. decisions and regulations.